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IN THE

Supreme Court of the United States

OCTOBER TERM — 1961

No. 323

CLIFFORD VAUGHAN
Petitioner

v.

N. J. ATKINSON, etc., et als
Respondents

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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IN THE

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

American Waterways Corporation, owner of the American Steamship NATIONAL LIBERTY, files herewith its brief in opposition to the petition for writ of certiorari heretofore filed by Clifford Vaughan.

CITATIONS OF OPINIONS BELOW

The memorandum opinion of the District Court printed in the Appendix is unreported at this printing. The opinion of the Circuit Court of Appeals is also unreported at this printing, but is set forth fully in the Appendix of the petition of Clifford Vaughan.

QUESTIONS PRESENTED

I. WHETHER SHIPOWNER IS ENTITLED TO HAVE MAINTENANCE DUE SEAMAN MITIGATED BY SUMS EARNED BY SEAMAN DURING PERIOD OF OUT-PATIENT TREATMENT WHERE SEAMAN IS ABLE TO WORK WITHOUT INJURY TO HIS HEALTH AND WITH CONSENT OF ATTENDING PHYSICIANS.

II. WHETHER SEAMAN IS ENTITLED TO DAMAGES OTHER THAN INTEREST WHERE COURT FINDS SHIPOWNER WAS DERELICT IN NOT PAYING MAINTENANCE DUE SEAMAN BUT WHERE THE FAILURE TO PAY SAID MAINTENANCE HAS IN NO WAY AGGRAVATED SEAMAN'S ILLNESS OR AFFECTED HIS PHYSICAL OR MENTAL CONDITION.

FACTS

The statement of facts as set forth on pages 3 and 4 of petitioner's petition are correct insofar as they are stated. To the facts as stated we should like to add the following facts: (1) The NATIONAL LIBERTY was the first vessel on which petitioner had ever served as a seaman. For several years prior to signing on the NATIONAL LIBERTY on November 26, 1956, the petitioner had worked as a taxi driver, the same employment that he obtained during his out-patient treatment. (2) The petitioner was advised by his attending physicians that it would be permissible for him to work as a taxi driver during his out-patient treatment. (3) That even following the District Court's Interlocutory Decree of May 12, 1959, wherein the petitioner was awarded maintenance at $8.00 less any amounts earned, the petitioner continued to work as a taxi driver and (4) that petitioner's physical and/or mental condition were in no way affected by his working during his out-patient treatment.

ARGUMENT

I. THERE IS NO CONFLICT AMONGST THE CIRCUITS AS TO THE BASIC PROPOSITIONS OF LAW SET FORTH BY THE COURT BELOW.

The decision in the case of *Jones v. Waterman S. S. Corp.*, 155 F 2(d) 992 is not concerned with either of the issues raised in the case at bar. The Jones case, *supra,* is concerned with the basic proposition that a seaman who falls sicks on a vessel is entitled to maintenance and cure so long as his need continues or until he reaches maximum cure. The case of *Yates v. Dann,* 223 F 2(d) 64, a more recent Third Circuit case and heavily relied on by petitioner, does not stand in direct opposition to the decision of the Court below in this case as petitioner would wish the Court to believe. The *Yates* case, *supra,* stands for the basic proposition that employment of a seaman while undergoing out-patient treatment does not per se cut off his right to maintenance payments. To this basis rule of law we fully subscribe. However, the *Yates* case, *supra,* is not concerned with the two questions before this Court.

Nor can we find any inconsistency between the decision of the Second Circuit in *Evans v. Schneider Transportation Company*, 250 F 2(d) 710 and *Perez v. Suwanee Steamship Co.*, 239 F 2(d) 180. In fact, in the *Evans* case, *supra,* Perez, *supra,* is cited on page 713 for the basic holding in the case, that a seaman cannot recover maintenance and cure in addition to loss wages for the same period of time. Likewise, the case of *Bradt v. U. S.*, 221 F 2(d) 325, is in no way in conflict with *Perez, supra,* In *Bradt, supra,* the Court merely held that Bradt's enrollment at Maritime School as a student should not prejudice his recovery for maintenance and

cure. This case is in conformity with the decision in *Yates, supra*, but has no bearing on the two questions raised in the case at bar.

The case at bar is not unlike the case of *Wilson v. United States*, 229 F 2(d) 277, wherein the Court allowed the seaman $8.00 per day for maintenance while an out-patient from the U. S. P. H. S. Hospital at Baltimore, Maryland, mitigated by whatever amount the seaman earned during the period in question. For days the seaman did not work, he was allowed $8.00 per day just as Judge Hoffman permitted in the case at bar. As was stated by the Court in the *Wilson* case, supra, at page 281; the duty to pay maintenance and cure:

> ". . . is sufficiently contractual so that the seaman has the equivalent of the so-called 'duty' to mitigate damages."

And as was stated in *Warren v. United States*, 75 F. Supp. 836, at page 838:

> "In short, since the seaman's right is a species of the generic right of obligees of employment contracts, he like other promisees of employment contracts is entitled to recover only such losses of wages, board and lodging as in the exercise of due diligence as he could not avoid."

And as the Court states in *Perez v. Suwanee Steamship Co., supra*, at page 181, in connection with a seaman's claim for maintenance and cure:

> "We cannot, however, agree with the refusal to deduct from the award the wages earned by the plaintiff as dishwasher during the period of incapacity."

In the Court below the libellant's proctor placed great emphasis upon the Second Circuit's opinion in *Reardon v. California Tanker Co.*, 260 F 2(d) 369, as did dissenting Chief Judge Sobeloff. However, that case is clearly distinguished from the case at bar and the cases cited above in that *Reardon, supra,* the libellant did not seek a recovery for maintenance and cure, but sought only to recover damages for personal injury under the Jones Act, 46 U. S. C. §688. It was not the intention of the Second Circuit in *Reardon, supra,* to reverse its previous holdings cited above in the *Perez* case, *supra*, and the *Wilson* case, *supra.* This is clearly stated by Circuit Judge Waterman in his concurring opinion set forth at page 376 of the *Reardon* case, *supra,* at page 377:

> "Reardon sought no adjudication by the district court respecting the sufficiency of the $8.00 a day allowance, or the adequacy of the 72-day duration of these $8.00 daily payments. The district court held that these maintenance payments had no application to damage claims asserted under the Jones Act, the claims that Reardon did present to it for adjudication. It held that inasmuch as the libellant had not sought any allowance for maintenance and cure from the Court, the respondent could not show any over-allowances it may have made out of court therefor.
>
> "Lest we create further confusion, we should not attempt to ascribe further reasons to support our affirmance than those the court below acted upon. Where the seaman has included a prayer in his libel for the granting of an allowance for maintenance and cure we have permitted shipowners to put in defense looking toward reductions of the amount claimed. *Perez v. Suwanee S.S. Co., supra., Wilson v. U. S.,* 2 Cir, 1956, 229 F (2d) 277, where

Judge Frank said of the nature of the claim for allowance for maintenance and cure, "it is sufficiently 'contractual' so that the seaman has the equivalent of the so-called 'duty' to mitigate damages.' Supra at page 281. And where the seaman has expended nothing for the maintenance he seeks the court to allow him shipowners heretofore have been permitted to show it, thereby preventing the seaman from recovering anything. *Johnson v. U. S.*, 1948, 333 U. S. 46, 50, 68 St. Ct. 391, 92 L. Ed. 468; *Field v. Waterman S. S. Corp.*, 5 Cir., 1939, 104 F (2d) 849; *Stankiewicz v. United Fruit S. S. Corp.*, 2 Cir. 1956, 229 F (2d) 580, 581; *Williams v. U. S.*, 228 F (2d) 129, 134, certiorari dei., 351 U. S. 986, 76 S. Ct. 1054, 100 L. Ed. 1499, The PAY MEAD, 9 Cir., 1937, 88 F (2d) 144. By our present decision I would not wish it understood that the decisions I mention are no longer applicable in this Circuit." (Italics added for emphasis)

II. WHERE SHIPOWNER'S FAILURE TO PAY SEAMAN MAINTENANCE DID NOT AGGRAVATE SEAMAN'S ILLNESS THE SEAMAN IS NOT ENTITLED TO DAMAGES OTHER THAN INTEREST ON EACH DAY'S MAINTENANCE FROM THE DAY THE SAME BECAME DUE.

The District Court stated in its opinion of November 5, 1959 (page 2a, this Appendix):

> ". . . in the present case there is no evidence before the Court which would justify a finding that the failure to furnish maintenance caused or aggravated the illness. . . . . There is no indication of any physical or mental suffering. . .".

Thus, Judge Hoffman concluded (at page 2, Appellant's Appendix):

> ". . . in the absence of provable damages, no

allowance can be made to the libellant for this cause of action."

In the case at bar, the fact is undisputed that the only damage sustained by libellant as a result of respondent's failure to pay maintenance was an attorney's fee. In this regard, libellant's position is no different than other litigant who seeks to recover on a note, open account or other contractual obligation. In all of the last instances cited, the most a successful plaintiff would be permitted to recover would be the principal amount due plus interest. In no instance would the plaintiff be awarded attorney's fees as the libellant here contends he is entitled to recover. This point was long ago decided by the Supreme Court of the United States in *Oelrichs v. Spain,* 15 Wall 211, and cited with approval in *Tullock v. Mulvane,* 184 U. S. 497, at page 512:

> "In debt, covenant, and assumpsit damages are recovered, but counsel fees are never included."

What libellant seeks, in effect, is to have the Court award him compensation for attorney's fees. As above set forth, such damages are not recoverable. The reasoning behind this ruling is stated by the Court in the *Oelrichs* case, *supra,* as follows:

> "The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality."

The ancient case of *The APOLLON,* 9 Wheat 373 (1824), cited by Petitioner as authority for the proposition that he is entitled to attorney fees as damages is no longer the law. Whatever discretion the admiralty court may have had in certain cases (it never had such

authority in cases such as this) was removed by the statute of February 26, 1853. Likewise, the case of *Sprague v. Ticonic Bank,* 307 U. S. 161 (1930) is totally inapplicable to the case at bar.

The cases cited by libellant as authority for the proposition that damages may be awarded for a failure to pay maintenance though no damages have been proved and cited on page 8 of petitioner's petition are totally inapplicable to the case at bar and do not, in fact, stand for this proposition which libellant propounds. In none of the cases cited was libellant awarded damages for the mere failure or refusal per se of owners to pay maintenance.

In *the TROY,* (W.D.N.Y.), 121 Fed. 901, the allowance was limited to living expenses and some compensation for suffering endured by the seaman by reason of not having care and attention as required under the circumstances of his case. But as Judge Hoffman found in this case:

> "There is no indication of any physical or mental suffering. . .".

In *Ran v. Atlantic Refining Co.,* 87 F. Supp. 853, it was only determined that the seaman's right of action for maintenance and cure arises on a day-to-day basis. No question of damages was presented in that opinion.

CONCLUSION

The petition of Clifford Vaughan seeking a writ of certiorari in this cause should be denied for the following reasons: (1) There is no basic conflict amongst the circuits as petitioner alleges relative to the two questions raised; (2) the issues raised in this case are peculiar to this particular case and are of no general importance and (3) the decision of the District Court below, upon the facts of this particular case, was correct.

Respectfully submitted

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APPENDIX

MEMORANDUM

FILED BY DISTRICT JUDGE HOFFMAN August 22, 1960, NUNC PRO TUNC AS OF NOVEMBER 5, 1959

The Libellant, an American seaman, served on the Respondent's vessel, the American Steamship "NATIONAL LIBERTY" from November 26, 1956, to March 2, 1957, when he was discharged from said vessel at Norfolk, Virginia, upon the termination of a voyage. On March 8, 1957 Libellant reported to the United States Public Health Service Hospital at Norfolk, Virginia, for examination and was admitted to that institution as an in-patient on March 18, 1957, for treatment for suspected tuberculosis. Libellant was discharged to an out-patient status on June 6, 1957, and remained an out-patient until August 25, 1959, when he was notified that he was discharged fit for duty as of August 19, 1959.

DAMAGES FOR FAILURE TO PAY MAINTENANCE AND CURE

The evidence in this case justifies a finding that the Respondent was derelict in its duty to pay maintenance. The Libellant had forwarded to the claims and insurance manager for National Shipping and Trading Corporation an abstract of his clinical record indicating that Libellant was admitted to the United States Public Health Service Hospital at Norfolk, Virginia, on March 18, 1957, and was discharged to an out-patient status on June 6, 1957. The records of the hospital reflect a strong probability of active tuberculosis. The only investigation conducted by the Respondent was to inter-

rogate the master and chief engineer, who states that the Libellant had never complained of any illness during his four months' service as a wiper on the SS "NATIONAL LIBERTY". It is admitted, however, that the Master furnished Libellant a certificate to enter the Public Health Service Hospital upon Libellant's discharge on March 2, 1957. Respondent made no effort to further investigate the status of Libellant's claim, and apparently did not even bother to admit or deny the validity of his claim for maintenance. Such action on the part of the Respondent would give rise to a claim for damages under *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371, providing that the failure to furnish maintenance has caused or aggravated an illness. In the present case, there is no evidence before the Court which would justify a finding that the failure to furnish maintenance caused or aggravated the illness. I have examined the authorities submitted by Proctor for the Libellant, including *The Troy*, 121 F. 901, 906; Ran v. Atlantic Refining Co., 87 F. Supp. 853; and Murphy v. American Barge Line Co., 3 Cir. 169 F. (2d) 61, 64. While there is some statement in *The Troy* which could possibly be construed as an allowance of damages for failure to pay maintenance, it is clear that such allowance was limited to living expenses and some compensation for the suffering which Libellant endured by reason of not having the care and attention for under the the circumstances of the case. Under the evidence before the Court at this time it appears that Libellant actually earned more during his out-patient status than he had earned before signing on the vessel. There is no indication of any physical or mental suffering and, in the absence of provable damages, no allowance can be made to the Libellant for this cause of action.

The evidence does show, and the Court finds, that Libellant was required to pay one-half of the amount recovered by way of maintenance to his proctor. This is undoubtedly a diminution of the total amount which should have been paid to Libellant, but this Court knows of no authority which would justify the reimbursement of counsel fees through the guise of an allowance for damages incident to the failure to pay maintenance.

For the foregoing reasons, the claim for damages for failure to pay maintenance will be dismissed.

THE CLAIM FOR MAINTENANCE

At the request of Libellant, the Court granted a hearing on a application for interlocutory decree to require the Respondent to pay the maintenance alleged to be due said Libellant. This hearing was held on February 25, 1959, and on May 12, 1959, the Court entered an interlocutory decree granting the Libellant maintenance at the rate of $8.00 per day as specified in his union contract for the period beginning June 6, 1957 (the date of his discharge from the hospital as an out-patient) to and including February 18, 1959, but provided that the total amount should be mitigated by the net amount earned by Libellant during said period while employed as the driver of a taxicab. The order further provided that Respondent would be required to continue the payment of maintenance at the rate of $56.00 per week, subject to a credit for any sums earned by Libellant by reason of his employment as aforesaid, until such time as the Libellant reached the maximum state of recovery. Libellant contends that no credit should be given by reason of Libellant's earnings during the time of his employment while an out-patient, but the weight

of the authority appears to indicate to the contrary. The Court adheres to its previous view that Respondent is entitled to a credit for the sums earned by Libellant while an out-patient. It should be noted that Libellant was allowed interest at the rate of 6% per annum for each week's maintenance which remained unpaid and, to this extent, the Respondent was obligated to pay for its neglect in observing its duty to provide maintenance.

Proctors have stated that maintenance has now been fully paid to and including August 19, 1959. Libellant contends that he is entitled to maintenance for an additional six days namely, August 20, 21, 22, 23, 24 and 25. The circumstances giving rise to this contention are that the Libellant was examined at the hospital on August 19, 1959, but was not then notified that he was fit for duty. He was instructed to report back to the hospital on August 25. When he reported on August 25, the hospital then notified him that he would be discharged as fit for duty as of August 19, 1959. In the opinion of the Court Libellant is entitled to the additional six days' maintenance, without interest, as Libellant remained an out-patient while under orders to report back on a specific date. Furthermore, the factual situation presented in this case clearly shows that the hospital had examined the Libellant on August 19, but had reached no conclusion as to his condition and the effect of the hospital's discharge as fit for duty was substantially one of relating it back to the date of the final examination. This ruling is not to suggest that a seaman must be officially notified when he is fit for duty, but if the seaman is directed to report back at a later date, presumably for a further examination, the seaman has

the right to assume that maintenance will be continued pending a final determination of his status.

Accordingly, a decree will be entered permitting the recovery of maintenance for the additional period of six days, less such sums as were earned by the Libellant in his employment as a taxi driver.

CAUSATION OF ORIGINAL ILLNESS

The evidence does not firmly establish that Libellant suffered from active tuberculosis, but he undoubtedly had a condition which required treatment.

There is no credible testimony in this case pointing to any connection between the illness of Libellant and the cause of same. There is no merit in Libellant's contention that there existed any violation of 46 U.S.C.A. Sec. 673, or any provisions of the union agreement. Assuming, without finding, that such violations did exist, there is no suggestion that the violations were associated with Libellant's condition. The cause of action alleging that the Respondent is liable for the illness is dismissed.

THE CLAIM FOR WAGES

It is admitted that Libellant was discharged and the voyage ended on March 2, 1957, at which time Libellant was paid his wages in full. He now contends that, as a matter of discretion, he is entitled to wages for a reasonable period after the termination of the voyage. He relies upon *The Michael Tracy*, 4 Cir., 295 F. 680. It is urged that this authority stands for the proposition that, in some cases, wages are allowed beyond the time of the termination of the voyage. A close analysis of this decision points to the fact that Libellant was allowed

maintenance which was the equivalent of wages. Nor is there any support to Libellant's contention in *Seville v. U.S.*, 9 Cir. 163 F. (2d) 296, 298, wherein it is stated that wages are payable "at least" so long as the voyage is continued. The matter is put to rest in *Farrell v. U. S.*, 2 Cir., 167 F. (2d) 781, in which the Court approves the allowance of wages to the end of the voyage. On certiorari to the United States Supreme Court, the majority of this Court held that the shipowner was obligated only for the voyage on which the ship was engaged when he signed on. See *Farrell v. U.S.*, 336 U.S. 511. The claim for wages covering a reasonable period after the termination of the voyage is disallowed.

Proctors may use the views of the Court in preparing the Findings of Fact and Conclusions of Law. Costs will be assessed against the Respondents.

/s/ WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
Entered nunc pro tunc
as of November 5, 1959.
August 22, 1960